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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 817

THOMAS F. BUCK and MARY P. BUCK,
Appellants,

vs.

STATE OF NEW JERSEY,
by the State Highway Commissioner,
Respondent.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

JURISDICTIONAL STATEMENT

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Appellants appeal from the final order of the Supreme Court of the State of New Jersey, entered April 18th, 1967, reported in 49 N. J. 359, 230 A. 2d 393, denying petition for Certification to the Appellate Division of the Superior Court of New Jersey to review the judgment of the said Appellate Division entered on February 20, 1967, reported

at 94 N. J. Super. 84, 226 A. 2d 840, affirming a judgment of the Law Division of the Superior Court of New Jersey, entered on April 4th, 1966, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial constitutional question is presented.

Opinions Below

The Supreme Court of New Jersey did not write an opinion. Its order denying Appellants' Petition for Certification printed in Appendix A hereto, *infra*, p. 1a, is reported at 49 N. J. 359, 230 A. 2d 393. The Opinion of the Appellate Division of the Superior Court of New Jersey, printed in Appendix B, hereto, *infra*, p. 2a is reported at 94 N. J. Super. 84, 226 A. 2d 840. The oral opinion of the Law Division of the Superior Court of New Jersey, printed in Appendix C, hereto, *infra*, p. 7a is not reported.

Jurisdiction

The Appellee, State of New Jersey, by the State Highway Commissioner, commenced a condemnation action against a tract of land owned by the Appellants consisting of approximately five acres in the Township of Harding, County of Morris, State of New Jersey. Appellants duly filed an answer challenging the right of the Appellee to take the entire tract. The Law Division of the Superior Court of New Jersey proceeded in a summary manner by granting a hearing on the preliminary question as to whether the State had exceeded its authority under the New Jersey Statutes, and hearing was had on March 11, 1966, March 30, 1966, March 31, 1966 and April 4, 1966. The Court made a final decision on April 4, 1966, determining that the State of New Jersey was within its rights under the Statute in taking the entire

parcel. Its judgment was affirmed by the Appellate Division of the Superior Court on February 20, 1967. The Supreme Court of New Jersey entered its order denying petition for certification to the Appellate Division of the Superior Court on April 18th, 1967. A Notice of Appeal to this Court was filed in the Supreme Court of New Jersey on July 14th, 1967. On September 11th, 1967, the Hon. Nathan L. Jacobs, Associate Justice of the Supreme Court of New Jersey, signed a consent order for an extension of time to file the record, docket the appeal and file the Jurisdictional Statement, to and including October 16, 1967. Appellants time for docketing the appeal in this case was further extended to and including November 15, 1967, by order of Honorable William J. Brennan, Jr., Associate Justice of this Court, dated October 14th, 1967. Jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 20, United States Code, Section 1257(2), since the validity of a State statute was drawn into question on the ground that it is repugnant to the Constitution of the United States and it was held to be valid. The Statute in question is N.J.S.A. 27:7A-4.1. The verbatim text of said Statute, being found in Volume 27 of the N. J. Statutes Annotated, at page 132, is as follows:

> "Acquisition of Entire Lot, Block or Tract When Acquiring Property for Freeway or Parkway
>
> In connection with the acquisition of property or property rights for any freeway or parkway or portion thereof, the State Highway Commissioner may, in his discretion, acquire by gift, devise, purchase or condemnation, an entire lot, block or tract of land, if, by so doing, the interests of the public will be best served even though said entire lot, block or tract is not needed for the right-of-way proper but only if

the portion outside the normal right-of-way is landlocked or is so situated that the cost of acquisition to the State will be practically equivalent to the total value of the whole parcel of land; provided, however, that the State Highway Commissioner shall not have the power to acquire by the exercise of the right of eminent domain for any of the purposes of this act or any property or property rights owned or used by any public utility as defined in section 48:2-13 of the Revised Statutes. L. 1952 c. 21, p. 105 §1."

The following cases sustain the jurisdiction of the Supreme Court to review this judgment on appeal: *McPherson* v. *Blacker*, 146 U. S. 1 (1892); *Boyd* v. *Thayer*, 143 U. S. 135; *Berman* v. *Parker*, 348 U. S. 26 (1954); *O'Neill* v. *Leamer*, 239 U. S. 244 (1915).

Questions Presented

1. Does a substantial question arise under the Constitution of the United States, or of the State of New Jersey, which is of general public importance and which urgently requires an adjudication by this Court?

2. Is N.J.S.A. 27:7A-4.1 unconstitutional?

3. Is a Judge of the Law Division of the Superior Court of New Jersey entitled to make a determination of value, or does the law of the State of New Jersey vest this right solely in Condemnation Commissioners or, on appeal, in a Jury?

4. Can a condemning authority: i.e., the New Jersey Commissioner of Transportation (Highway Commissioner) take property from a private citizen for the exclusive use of another citizen?

Statement

Appellants, Thomas F. Buck and Mary P. Buck, are the owners, in fee simple, of lands and improvements thereon known as 666 Mt. Kemble Avenue in the Township of Harding, Morris County, New Jersey (D2a, 11 and 12; D10a-8 and 9). This property consists of approximately five acres of land and various buildings thereon and comprises all of parcels "30A" and "30B" as designated on the map attached to the Complaint herein (Exhibit B, D5a) and on the various exhibits admitted into evidence in this matter (S-1, S-2, S-3, D-4; D231a to D237a). Some portion of the premises designated "30A" by Appellee's engineers lies in the path of proposed construction of Freeway 287 and is being condemned for such construction. Appellants do not dispute the right of the Commissioner, in the exercise of his discretion, to take such portion of said premises.

However, these Appellants do dispute the right of the State to take that portion of said premises which lies to the Southeast of parcel "30A", which consists of the parcel designated "30B" as well as additional lands on the Southeast and Northeast of parcel "30A" (Exhibits S-3 and S-4; D166a-12 to D117a-19).

The lands in question are more easily identified by examiantion of the State's exhibits. They consist of all of that portion of Appellants lands which lie to the Southeast of a line represented by projecting a continuation of the Southeasterly line of the proposed right of way as it appears on either side of Appellants' property on State's exhibit "S-2" and include also certain portions on the Northwest side which lie outside of the right of way proper. The State admits (Exhibits S-3 and S-4) that its purpose in taking the portion known as "30B" is for use as a 10 foot wide gravel drive to serve a private property owner (Sheldrick)

to the Southwest of the Appellant's property, who will be left with a 5.308 acre landlocked piece (D54a-11 to D55a-19) after condemnation of the front portion of his lands for Federal Route 287. It is further admitted that the present zoning code in the municipality involved places both properties in a "AAA" residence zone which requires a minimum of three acres for a single building lot and single family residence.

The question of the validity of the statute involved was first raised in Appellant's brief in the trial court and in arguments of Appellant's counsel—also in the trial court. This question was not passed upon by the trial court. Also raised in the trial court was the question of whether the proposed taking was a taking of private property for private use (D204a-20 to D205a-7). This private property question was again raised in the Appellant's brief in the Appellate Division of the Superior Court as point IV thereof. The question of the validity of the Statute involved (N.J.S.A. 27:7A-4.1) was not raised in Appellant's brief in the Appellate Division inasmuch as Appellants placed a different construction on the Statute in point I of the same brief. When the Appellate Division, in its decision, rejected Appellant's construction of this Statute, the Appellants attacked the constitutionality of the Statute as construed by the courts below, in point IV of their Petition for Certification filed with the Supreme Court of New Jersey. This petition was denied.

The question of the constitutionality of taking private property for private use was also raised in points I and III of the Appellant's Petition for Certification.

How the Federal Question is Presented

(A) Law Division of the Superior Court

N.J.S.A. 27:7A-4.1 was attacked as invalid in the Court on the grounds that compliance with the Statute necessitated taking the function of determining land values, in condemnation actions, out of the purview of the Condemnation Commissioners, to be appointed, or out of the hands of the jury in the event of appeal, and further, that the construction of said Statute, urged by the State, would result in furnishing the State of New Jersey with Statutory authority to take private property for private use. The trial court held, in essence, that the amount and extent of the taking is left to the discretion of the legislative agent and will not be interfered with by the courts when said agent is exercising good faith. The court went on to find that it was the Appellants duty to show an abuse of discretion or failure on the part of the legislative agent to exercise good faith and that the Appellants had failed in such proof (Appendix C, *infra* p. 7a).

(B) Appellate Division of the Superior Court

Appellants argued both orally and in their brief, before the Appellate Division of the Superior Court of New Jersey, that under no circumstances, and even upon just compensation being made, can the State take private property for private use, setting forth the Fifth Amendment of the Constitution of the United States as well as Article I, paragraph 20 of the Constitution of New Jersey and citing appropriate New Jersey authorities. Appellants, also argued that there was an abuse of discretion in the instant case by the State Highway Commissioner and, further, that the trial court did not properly construe N.J.S.A. 27:7A-4.1. By implication the Appellate Division held that the said statute, and the construction placed on same by the

trial court, was constitutional in holding that the State Highway Commissioner could acquire Appellants entire tract notwithstanding the fact that the condemnation of the disputed portion would serve a private interest—finding that it was sound business judgment and in the public interest to take the entire parcel (Appendix B, *infra*, p. 2a).

(C) Supreme Court of New Jersey

The validity and constitutionality of N.J.S.A. 27:7A-4.1 was challenged in the Supreme Court of New Jersey on the grounds that it was in violation of both the Constitutions of the United States and of New Jersey, as aforesaid.

The Supreme Court denied Appellants' petition for Certification, without opinion (Appendix A, *infra*, p. 1a).

The Questions Are Substantial

The questions are substantial because they involve, among other things, the validity of a statute of the State of New Jersey (N.J.S.A. 27:7A-4.1), which, by the construction given said statute in the instant case by the courts of the State of New Jersey, a State agency is enabled to condemn the private property of one man for the admitted exclusive use of another. The Doctrine of Eminent Domain has never been extended to include this right. It is repugnant not only to the Constitutions of the United States and of New Jersey but is repugnant to all basic concepts of our heritage. Appellants contention is, and has been, that the New Jersey Legislature, in exacting the subject statute, intended, when it included the language: "if, by so doing, the interests of the public will be better served . . ." that some actual use by the public would be made of the property being so taken. The decisions of the New Jersey courts in this case indicate, on the other hand, that the requirements of the statute have been satisfied upon a showing that the acquisition of the disputed portion

is of some economic advantage to the State in its overall highway program. Appellants submit that this reasoning, applied to hundreds or even thousands of similar situations within the State, will provide the State of New Jersey with the opportunity of condemning private property and applying same to private use without regard to any constitutional prohibition. In effect, the State's construction of the statute would permit the State to condemn private property for private use if in so doing the state would have a financial advantage. Carried to its infinite conclusion, the State would be permitted to acquire any private property adjacent to any highway construction and extend the use of the acquired land to private users.

Chief Justice Charles Evans Hughes, of this Court, in *O'Neill* v. *Leamer*, 239 U. S. 244, 36 Sup. Ct. Rep. 54 (1915) stated, in part, in dealing directly with the question as to whether a substantial Federal question was raised and whether jurisdiction attached, in a case where the Appellants charged that a Minnesota statute was invalid because it authorized the taking of private property for a private use:

> "... But we think that the plaintiffs sufficiently raised the question whether the appropriation was essentially for a private purpose, and hence contrary to the 14th Amendment as amounting to a depravation of property without due process of law, and that their contention as to their Federal right in this respect was denied by the state court. In this view jurisdiction attaches." (Citing numerous cases).

The importance of the questions herein lie not only in the fact of the tremendous size of the Federally supported highway program currently underway in the State of New Jersey, but because the instant case, as it now stands con-

cluded in the State of New Jersey, furnishes precedent for the continuing and probably ever-expanding acquisition of private properties for any use whatsoever. In other words, the State can condemn private property for any use whatsoever, providing only that it meets a vague financial advantage to the State. The precedent now standing in the State of New Jersey is a hole in the dyke of constitutional protection of a private citizen's right to own property. Only the Supreme Court of the United States has the finger to plug this hole.

In *U. S. ex rel. TVA* v. *Welch et als.*, 327 U. S. 546, 90 L. Ed. 843 (1946) Mr. Justice Black held that it can be the function of Congress to determine what type of taking constitutes a public use. However, Mr. Justice Frankfurter, in a concurring opinion, sustained the right of this Court to ultimately determine the question, stating:

> "This Court has never deviated from the view that under the Constitution a claim that a taking is not 'for the public use' is open for judicial consideration ultimately by this Court . . . I assume that in citing these cases the Court again recognizes the doctrine that whether the taking is for a public purpose is not a question beyond judicial competence."

It is also significant to note that the New Jersey statute, under attack, is a part of the general condemnation act of New Jersey and not a part of the specific legislation authorizing the construction of the proposed highway.

See also *Old Dominion Land Company* v. *U. S.*, 269 U. S. 55, 70 L. Ed. 162.

Chief Justice Fuller of this Court, in *McPherson* v. *Blacker*, 146 U. S. 1 (1892) stated, in dealing with the question of the jurisdiction of this Court:

> "But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and law of the United States, and this is a case so arising, since the validity of the State law was drawn into question as repugnant to such Constitution and law, and its validity was sustained."

The so-called "Vester Rule" was enunciated by Chief Justice Hughes in 1930, in *Cincinnati* v. *Vester*, 281 U. S. 439, 74 L. Ed. 950 as follows:

> "It is well established that in considering the application of the 14th Amendment to cases of expropriation of private property the question what is a public use is a judicial one. In deciding such a question, the Court has appropriate regard to the diversity of local conditions and considerations with great respect to legislative declarations and in particular the judgments of State courts as to the uses considered to be public in the light of local exigencies. But the question remains a judicial one which this court must decide in performing its duty of enforcing the provisions of the Federal Constitution."

That case dealt with the validity of an ordinance of Cincinnati authorizing "excess condemnation" of private lands in conjunction with the widening of a road. It is very similar, in its factual considerations, to the case *sub judice*. The "Vester Rule" was, perhaps, to some extent modified by the expression of this Court made by Mr. Justice Douglas in *Berman* v. *Parker*, 348 U. S. 26, 99 L. Ed. 27:

> "In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia (citing

cases). This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one (citing cases)."

Appellants urge that while the *Berman* case has, to some degree, modified the holding of the *Vester* case, it has not eliminated the basic function of this Court in determining whether a particular piece of legislation violates the Constitution.

In the instant case, no substantial quarrel is made to the legislative right to condmen for a public highway. But Appellants urge the Court's consideration of a specific instance of a taking of private property for private use as admitted by the State as being a "6 inch gravel driveway" only "ten feet wide" and running only to a single family residence which cannot be further developed.

Appellants urge that the statute is defective also because it imposes upon the state court judge the duty of determining the value of the property (to decide what is "practically equivalent" as indicated in the statute). This, of course, becomes a part of public record in a public proceeding, at a time prior to any hearing before the condemnation commissioners, who, by New Jersey statutes, are to be appointed in every condemnation action for the exclusive purpose of making that very determination, thus denying the Appellants due process of law. Additionally, the condemnation act of New Jersey provides for an appeal, as a matter of right, from such award as the commissioners may make—such appeal to be by way of jury trial—affording the parties to the action their constitutional right of trial by jury. Appellants here urge that the statute question, by its very terms, denies the parties to a condemnation action, where-

in the entire taking is disputed, the right to a trial by jury of the issues of the value of the parcel or parcels to be condemned.

The fact that in the case before the Bar there has been a proceeding pursuant to the statute under attack, in which the trial judge made a finding as to the value of Appellant's entire premises, as well as a finding as to the value of the disputed portion and the value of the remainder, coupled with the fact that Appellants have yet to have their hearing before the commissioners or have exercised their right of appeal *de novo*, before a jury, is illustrative of the denial of due process, in this case, and a clear violation of the 14th Amendment of the United States Constitution.

CONCLUSION

The matter before this Court raises very substantial questions, of public importance, under the 5th and 14th Amendments of the U. S. Constitution and Article 20 paragraph 1 of the Constitution of the State of New Jersey which warrant resolving by this Court. It is most respectfully urged that jurisdiction should be noted and the judgments and orders below reversed.

Respectfully submitted,

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[APPENDICES FOLLOW]

APPENDIX A

Order of Supreme Court of New Jersey Denying Petition for Certification

(Filed—April 18, 1967)

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is thereupon Ordered that the petition for certification is denied with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 18th day of April, 1967.

A True Copy —

JOHN H. GILDEA
Clerk of the Supreme Court

APPENDIX B

Opinion of the Superior Court of New Jersey, Appellate Division

(Filed—February 20, 1967)

LEWIS, J. A. D.

This is a condemnation matter in which defendants Thomas F. Buck and Mary P. Buck appeal from a judgment of the Law Division in favor of plaintiff State of New Jersey appointing commissioners to appraise the value of land proposed to be taken in condemnation by the State Highway Commissioner.

By its complaint the State sought to condemn defendants' property, consisting of approximately five acres, for use by the State Highway Commissioner in the construction of a freeway known as Interstate Highway 287. Their land is designated on various engineering exhibits as "Parcels 30A and 30B." The major part of 30A lies in the path of the proposed freeway; defendants do not contest the right of the State to condemn that portion of their land. They do, however, dispute the authority of the State to take Parcel 30B abutting on the south and a small borderline strip along 30A, totaling approximately 80 feet in width (frontage) by 574.13 feet in depth and consisting of 1.078 acres. The property is in an AAA residential zone, and it was stipulated that the applicable local zoning regulations require a minimum lot size of 3 acres and a 100 foot frontage.

To the southwest of the Buck property are lands of Robert and Dorothy Sheldrick, the northwesterly part of which will be required for the right-of-way of Route 287, leaving 5.3 acres to the southeast. The State proposes to retain

title to Parcel 30B in public ownership and to make it available for access to that remainder portion of the Sheldrick lands which otherwise would be landlocked.

Defendants argue: (1) the Commissioner in the instant matter has abused his discretion or has been guilty of fraud or bad faith in the exercise thereof; and (2) he is attempting to take private property for private use. Plaintiff does not challenge the premise, which is recognized as a basic principle of the law of eminent domain, that the State may under no circumstances take private property for private use.

The trial judge, after a summary hearing on the question of whether the Commissioner had exceeded his powers, *Bergen County* v. *Hackensack*, 39 N. J. 377 (1963), found from the evidence that the value of Parcels 30A and 30B would be $46,000 while the value of 30A alone would be $45,000, and that when the Commissioner, in his discretion, sought to acquire the entire Buck tract he was acting in the best interests of the general public. He held that therefore the State's evidence met the statutory test provided in N.J.S.A. 27:7A-4.1, *viz.*:

> "In connection with the acquisition of property or property rights for any freeway or parkway or portion thereof, the State Highway Commissioner may, in his discretion, acquire by gift, devise, purchase or condemnation, an entire lot, block or tract of land, if, by so doing, the interests of the public will be best served even though said entire lot, block or tract is not needed for the right-of-way proper but only if the portion outside the normal right-of-way * * * is so situated that the cost of acquisition to the State will be practically equivalent to the total value of the whole parcel of land; * * * *."

Appendix B

The proofs amply support the findings of the trial judge and his conclusion. As he pointed out, when the State condemns all of a tract except a portion too small to comply with the zoning ordinance, the State must pay not only for what it takes but also for the damage to the remainder. Therefore when, as here, the value of the whole is little more than the value of the major part, it is sound business judgment and in the public interest to take the entire parcel. This avoids the expense of litigating the damage to the remainder and the hazards of a large award for such damage. We hold that here there was such a taking, and that here these considerations alone satisfied the requirements of N.J.S.A. 27:7A-4.1. In addition, we think the Commissioner, within the confines of said statute, may incidentally seek to avoid creating or leaving a landlocked parcel or parcels that do not comply with local zoning requirements. Rather than leave a land segment useless under local zoning and subject the State to payment of damages incident to unacquired remainder land, the Commissioner made a sound and sensible decision to condemn the entire tract at a practically equivalent cost, especially when in so doing he preserved accessibility to adjoining lands which have an apparent potential for development.

The fact that Sheldricks' private interests may be subserved will not defeat a condemnation proceeding; the controlling question is whether the paramount reason for taking land to which objection is made is in the public interest. Note, *Weaver* v. *Pennsylvania-Ohio Power & Light Co.*, 10 F. 2d 759, 762 (6 Cir. 1926). *Cf. Wilson* v. *Long Branch*, 27 N. J. 360, 376, *certiorari* denied 358 U. S. 873, 79 S. Ct. 113, 3 L. Ed. 2d 104 (1958); *United States* v. *Agee*, 322 F. 2d 139 (6 Cir. 1963). See generally Annotation, "Eminent Domain—Public and Private Purpose," 53 A. L. R. 9 (1928).

Appendix B

A use is not denominated public or private by simply relying upon the number of persons it serves. See *Scudder* v. *Trenton Delaware Falls Co.*, 1 N. J. Eq. 694, 726-728 (Ch. 1832), cited with approval in *Texas Pipe Line Co.* v. *Snelbaker*, 30 N. J. Super. 171, 176-178 (Law Div.), affirmed 33 N. J. Super. 11 (App. Div. 1954); *Essex County* v. *Hindenlang*, 35 N. J. Super. 479, 488-491 (App. Div. 1955), appeal dismissed 24 N. J. 517 (1957); *Rindge Co.* v. *Los Angeles County*, 262 U. S. 700, 706-707, 43 S. Ct. 689 L. Ed. 1186, 1192 (1923); 2 *Nichols, Eminent Domain* (revised 3d ed. 1963), §7.512(1), pp. 705-706; 5A *Thompson, Real Property* (1957 replacement), §2577, pp. 658-660. It has been stated that a use does not "fail to be public upon the ground that the immediate enjoyment of it is limited to a small group or even to a single person." *United States* v. *Boyle*, 52 F. Supp. 906, 908 (N. D. Ohio 1943), affirmed *sub nom.; Cleveland* v. *United States*, 323 U. S. 329, 65 S. Ct. 280, 89 L. Ed. 274 (1945). Accord, *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 161-162, 17 S. Ct. 56, 41 L. Ed. 369, 389-390 (1896).

In condemnation proceedings an administrative agent, operating under legislative mandate, has broad discretion in determining the quantity of land to be taken, its location and the time of taking; the judiciary will interfere only in a plain case of abuse of that discretion. *Burnett* v. *Abbott*, 14 N. J. 291, 294-295 (1954). An administrative determination will ordinarily not be disturbed in "the absence of an affirmative showing of fraud, bad faith or manifest abuse." *Bergen County* v. *S. Goldberg & Co., Inc.*, 76 N. J. Super. 524, 529 (App. Div. 1962), reversed on other grounds, affirmed as to this point of law, *sub nom.; Bergen County* v. *Hackensack*, 39 N. J. 377, 381 (1963); *N. J. Highway Authority* v. *Currie*, 35 N. J. Super. 525, 532 (App.

Div. 1955); *Tennessee Gas Transmission Co.* v. *Hirschfield*, 38 N. J. Super. 132, 138 (App. Div. 1955) and 39 N. J. Super. 286, 288 (App. Div. 1956); *City of Trenton* v. *Lenzner*, 16 N. J. 465, 473 (1954), *certiorari denied* 348 U. S. 972, 75 S. Ct. 534, 99 L. Ed. 757 (1955).

The condemnees did not charge the Commissioner with "fraud or bad faith" in the proceedings before the Law Division. That issue is raised for the first time in their brief on appeal, and without an appropriate notation thereof as required by R.R. 1:7-1(c). Although not required to consider that issue, we conclude from our study of the record that there is no basis to support any such charge.

On the merits of the present controversy we are satisfied that the proofs do not establish an abuse of discretion but, to the contrary, they support the conclusion that the Commissioner acted in the best interests of the public and within the statutory authority vested in him.

Judgment affirmed.

APPENDIX C

Oral Opinion and Findings of the Trial Court

The Court: This matter arises by reason of a complaint having been filed by the State Highway Commissioner seeking to take property belonging to Thomas F. Buck and Mary F. Buck for the purposes of Highway road No. 287. The property is on the southwesterly corner of Mr. Kemble Avenue and Anthony Wayne Road in Harding Township and the map attached to the complaint describes the property in two parcels, 30A and 30B. The matter first came before the Court on a demand for payment of a portion of the money deposited pursuant to R.S. 27:7-22 as amended by Chapter 79 of the Laws of 1965 and the Court made an order on that occasion for a portion of the deposit to be paid to the property owner and it appeared at that time and as part of that hearing that the property owner was questioning the necessity of the State's taking the property, first under the general power to take and, secondly, by reason of R.S. 27:7A-4.1, which became one of the keys to this case.

The Court therefore, consistent with the case of *Bergen County* v. *Hackensack*, 39 N. J. 377 1963, proceeded in a summary manner by granting a hearing on this preliminary question as to whether or not the State had exceeded its authority under R.S. 20:1-1 et seq. and also, as I stated, by reason of 27:7A-4.1, the controlling case being *State* v. *Davis*, 87 N. J. Super. 377, Appellate Division 1965.

The law, I think, of the case is quite clear, namely, that this general right of the State to take, inclusive of the right of the State to take under 27:7A-4.1, is left in the discretion of the legislative agent, namely, the highway commissioner, and by reason of a long line of cases starting with *Burnett* v. *Abbott*, 14 N. J. 291, 1954, at pages

294, 295, the court said the cases and authorities are in agreement that in condemnation proceedings the quantity of land to be taken, its location and the time of taking, are within the discretion of the body endowed by the legislature with the right of eminent domain, citing cases. Where a statute providing for a highway system designates particular routes without selecting the specific highways, the department vested with the authority to make final decisions in carrying out the work has authority to select the particular highways within reasonable limits on the highway route designated by the statute, citing several cases.

The amount and extent of the taking is left to the discretion of the legislative agent and it will not be interfered with by the courts when it is exercising in good faith. The court only interferes where there is a plain case of abuse of discretion in the exercise of the power of eminent domain in excess of the public use upon which it is bottomed in the particular instance. That was followed by *City of Trenton* v. *Lenzner*, 16 N. J. 465, 1954, preceded by *Weehawken Township* v. *Erie Railroad*, 20 N. J. 572, 1956, all of which are to the effect that there must be a clear showing of abuse of discretion, and I conclude that even this special statute proceeds on the same theory, namely, that it's the duty of the person contesting to show an abuse of discretion.

Now, when the case first came before me, that is, on the first hearing, we had some difficulty because of the right-of-way line and the testimony will show that I asked the State Highway engineers to get us some other maps, which they did at the second hearing, namely, S-3 and S-4. These maps show clearly that what the State proposes to do is to take all of the property and that whether they take the 60 feet just contiguous to the right-of-way and leave a gore

at the end of the property or whether they put the 60 feet at the southerly extension of the property and leave the gore next to the right-of-way, that we are here dealing with property that in total is approximately 1.02 acres, that the gore is .2 to .25 and that the other yellow strip is .88 acres.

It is also agreed that to the south of this property there is a piece known as the Sheldrick piece, which by reason of the State Highway's taking will leave a landlocked piece of land 5.308 acres and would have no access. I have heard the testimony of at least one State Highway engineer, of two experts, one for the property owner, Mr. Bauche and Mr. Steinberg for the State, and an engineer by the name of Scherzer, who testified as to the cost of building the road. Counsel for the property owner—and the Court had some little difficulty about the meaning of the statute—but I think ultimately counsel made it clear and the Court accepts his argument, that not only does the interest of the public section of 27:7A-4.1 have application to the clause that the cost of acquisition to the State will be practically equivalent to the total value of the whole parcel of land, as well as to the other section about the landlocking, but I come to the conclusion in this case that based upon the testimony of Mr. Steinberg, namely, that the cost of acquisition of 30A and 30B will be $46,000 and that the acquisition of 30A alone would be $45,000, that the State has met the two tests set forth in the statute.

Now, of course, without in any way determining the ultimate price to be paid for this property, I conclude that Steinberg much more nearly hits the mark as to the comparative values of the taking totally than does Mr. Bauche, who says that the whole property is worth $76,298 and some cents and that in his opinion this small piece is worth $9500, $6000 for the land, $3500 for a seed house shown in

P-1 in evidence, but I conclude, No. 1, that from the physical evidence it is difficult, almost incredible, to believe that the building has that value but, secondly, that Mr. Bauche proceeds upon an erroneous view of the ordinance because Section 3 as amended makes it clear that we are here dealing with residence zone, that the purpose of this ordinance is to provide certain things that may be done in a residence zone, and even Section 8—farming, truck gardening or nursery—which has ben amended so that farms, truck gardens and nurseries and the sale of products raised thereon make it perfectly clear that it is to be done in an otherwise conforming use in this zone, and I find that the whole argument about any accessory use, the use proposed by Mr. Bauche, namely, that this could be used for the storage of horses or for the storage of carriages, is without foundation under the ordinance. It is clear to the Court that we are here dealing with a piece of property having a frontage on Anthony Wayne Road of only 80 feet and a depth of some 575 on one side and 578 on the other side, in which it would be most difficult in the Court's view to obtain any variance, and I find incredible the ascribing of a $6000 value to a piece of property so located and so situated.

Proceeding on the other theory, which I find unnecessary to a decision, namely, that we are balancing here the getting of access to a landlocked piece, namely, the Sheldrick piece, proceeding on the Steinberg theory, the property would be worth $15,000, at approximately $3000 an acre, according to Scherzer's testimony it would cost $18,000 to build an accessory road, so the State would be out-of-pocket on that theory; but if you proceed on Mr. Bauche's theory the property, the five acres, would have a value of over $30,000, the road would cost $18,000, and the most you

would be required to say would be a $9500 value for this 1.2 acres plus the seed house, so the State even on that theory would come out slightly ahead although not very much.

It is my view that the Court is not called upon to decide in these instances whether or not if the Court had the power it would proceed as did the State. I come to the view that what the legislature meant to do was to give and put this discretion in the State Highway Commissioner and that absent showing this abuse of power, just as in our whole line of zoning cases, that absent this abuse of power the Court should not intervene but should let the matter reside in the person to whom the legislature has given it, namely, the State Highway Commissioner. I will determine that the State is within its rights under the statutes in taking the entire piece. You may present a judgment.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 817

THOMAS F. BUCK and MARY P. BUCK,

Appellants,

vs.

STATE OF NEW JERSEY,
by the State Highway Commissioner,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

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THOMAS F. BUCK and MARY P. BUCK,

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STATE OF NEW JERSEY,
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Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

Motion to Dismiss

Pursuant to Rule 16(b) of this Court, the Attorney General of the State of New Jersey, on behalf of the State of New Jersey, and the Commissioner of Transportation of the New Jersey Department of Transportation (formerly State Highway Commissioner) moves to dismiss this appeal on the grounds that the constitutionality of the statute

under attack was not raised properly before the State court and that the questions presented are so unsubstantial as not to require further argument.

Opinion Below

The oral opinion of the Law Division of the Superior Court of New Jersey is not reported but the same is reproduced as Appendix C of Appellants' Jurisdictional Statement. The opinion of the Appellate Division of the Superior Court of New Jersey affirming the decision of the trial court is reported at 94 N. J. Super. 84, 226 A. 2d 840, and is reproduced as Appendix B of Appellants' Jurisdictional Statement. The order denying Appellants' Petition for Certification of the Supreme Court of New Jersey is reported at 49 N. J. 359, 230 A. 2d 393 and is reproduced as Appendix A of Appellants' Jurisdictional Statement.

Questions Presented

1. Where the constitutionality of the State statute is not raised in proper or timely manner before the State courts, will this Court accept jurisdiction?
2. Have Appellants raised a substantial question under the Constitution of the United States by merely asserting that the same exists without demonstration thereof?
3. Will this Court overturn the legislative enactment of the State of New Jersey where that enactment is in accord with the Constitution of the United States as interpreted by this Court and where there is no showing of unconstitutionality or invalidity by Appellants?
4. Where a judge of the Law Division of the Superior Court of New Jersey makes a determination as to

relative valuation only and where Appellants' rights to full hearing on the ultimate question of just compensation have not been abridged or impaired in any way does Appellants' unfounded assertion of denial of due process raise a substantial question under the Constitution of the United States?

Statement of the Case

A. The Decision of the Law Division of the Superior Court of New Jersey.

On November 18, 1965 the State of New Jersey, by the State Highway Commissioner filed complaint in condemnation in the within cause. By this complaint the State sought to condemn certain property of Appellants Buck in Harding Township, Morris County, New Jersey. This property is shown on the condemnation map as Parcels 30A and 30B.

On January 20, 1966 the defendant filed his answer in this cause, contesting the State's right to take the parcel known as 30B, which is an oblong parcel approximately 60 feet in width and approximately 574.13 feet long. Defendant also contested the State's right to take another portion of the property, but has since waived as to that portion.

On the return date of the Order to Show Cause defendant appeared and the issue of the State's right to take was set down for a special hearing.

On March 1, 1966 this matter first came on to be heard before the Honorable Alexander P. Waugh, Assignment Judge, Superior Court of New Jersey. At that time, after lengthy colloquy and the testimony of one witness, a State Highway Engineer, it was determined that the matter be further adjourned and that the State prepare maps indicat-

ing the actual line of the right of way proper. This was done and the said maps were received into evidence by way of stipulation. The effect of this was to slightly enlarge the area in dispute to include 30B together with a small portion of 30A running along the northernmost border of 30B. The disputed segment was thereby enlarged from an area of approximately eight-tenths of an acre to an area of slightly over one acre. It was stipulated that local zoning regulations require a minimum lot size of 3 acres. The hearing was resumed on March 30, 1966 and testimony continued to be taken on March 31, 1966. It was developed during these days of testimony that immediately adjacent to the Buck property on the west, there is a parcel of land owned by Robert Sheldrick and Dorothy Sheldrick, his wife. This large and valuable parcel will be rendered completely landlocked by Route 287, which is a limited access highway and which is the same highway for which Appellants' land will be taken. In order to avoid a creation of a remnant parcel and to rectify the landlocked condition of the Sheldrick remainder and provide access to this parcel of 5.3 acres the State determined to acquire the comparatively worthless, unusuable 1.07 acre sliver which is the subject of this appeal. The Sheldrick acreage will then be available for development, and at the same time the State will be relieved of the burden of making compensation to the Sheldricks for this remainder of over 5 acres. Testimony below was clear that this solution was most economical of public funds as well as most inducive to maximum land use in the area.

It was further developed that the cost to the State of acquiring the entire parcel would be practically equivalent to the cost of acquiring only that portion which is not in dispute. Judge Waugh found as a matter of fact that the credible evidence was that acquisition of the whole would cost $46,000 and that acquisition of the portion within the

right of way proper would cost the State $45,000. It was not disputed at trial nor is it contested on appeal that these figures are "practically equivalent" within the meaning of N.J.S.A. 27:7A-4.1.

The trial court found that all the requirements of that statute had been complied with, and moreover that under the theory of *State* v. *Davis*, 87 N. J. Super. 377 (App. Div. 1965) certif. denied 46 N. J. 135 (1965), the State was also acting within its discretionary powers. Accordingly, on April 7, 1966, Order for Judgment and Appointing Commissioners was entered, permitting the State to acquire all of the Buck property, including the 1.07 acre, oblong parcel which is the subject matter of this appeal.

B. The Decision of the Appellate Division of the Superior Court of New Jersey.

On May 20, 1966 Appellants appealed the Order for Judgment and Appointing Commissioners to the Appellate Division of the Superior Court of New Jersey. On February 20, 1967 the Appellate Division unanimously affirmed the order of the trial court in a written opinion. The court stated therein after a careful analysis of the facts that the proofs amply supported the findings and conclusions of the trial judge. The Appellate Division went on to point out that where a remainder portion such as the area presently in dispute is created which is rendered too small to comply with the zoning ordinance, the State is justified in acquiring such a remnant in order to avoid the expense of litigating the damage to the remainder and to avoid the creation of landlocked parcels or parcels that do not comply with local zoning requirements. The court found that this was especially so when in so doing the Commissioner is able to employ this otherwise useless strip to preserve access to adjoining lands which have an apparent potential for de-

velopment. The Appellate Division cited numerous authorities for the well-settled proposition that the mere fact that a neighboring property owner's interests may be served will not defeat the State's right to acquire where the paramount reason for the acquisition is for a public use. The Appellate Division was careful to confine its opinion to those cases falling within the requirements of N.J.S.A. 27:7A-4.1 and concluded that the Commissioner acted in the best interests of the public and within the statutory authority vested in him.

C. The Decision of the Supreme Court of New Jersey.

Appellants petitioned the Supreme Court of New Jersey for certification to review the said order of the Appellate Division. On April 19, 1967 the Supreme Court of New Jersey denied Appellants' Petition for Certification thereby deciding inferentially that no substantial question was presented thereby. Rules of the New Jersey Courts Rev. Rule 1:10-2.

It is this denial which Appellants seek to appeal to this Court.

Summary of Argument

Appellants made no attack on the constitutionality of N.J.S.A. 27:7A-4.1 before the trial court or the Appellate Division. Nor did they raise such issue in any pleadings filed in the within matter until their Petition for Certification before the Supreme Court of New Jersey. The rules of court of the New Jersey Supreme Court as well as appropriate New Jersey authority states that the New Jersey Supreme Court is not bound to consider constitutional issues not raised properly below. Accordingly, Appellants did not draw into question the validity of the statute now under attack in a manner consistent with Title 20 United States Code, Section 1257 (2).

Appellants' unfounded assertion that substantial questions arise under the Constitution of the United States is without merit. An examination of appropriate authority both judicial and academic reveals that what Appellants charge is a "private use" intended for the property in question is in fact a well-settled public use even without regard to specific statutory authority. Appellants' untimely attack upon the constitutionality of the statute under consideration is further totally without substance in that this Court has decided that where the legislature determines that a particular taking is in furtherance of a public use this Court will not review this determination. *Berman* v. *Parker,* 348 U. S. 26, 99 L. Ed. 27 (1954); *U. S. ex rel. TVA* v. *Welch, et al.,* 327 U. S. 546, 90 L. Ed. 843 (1946).

Further Appellants have totally failed to demonstrate the basis for their claim that N.J.S.A. 27:7A-4.1 is unconstitutional even if judicial review were deemed appropriate.

ARGUMENT

POINT I

The Appellants did not attack the constitutionality of N.J.S.A. 27:7A-4.1 in proper or timely fashion before the State courts and they therefore cannot attack the same on appeal to this Court.

Appellants made no attack on the constitutionality of N.J.S.A. 27:7A-4.1 before the trial court, nor did they raise that issue in their answer. New Jersey Rules provide that any matters which Appellant seeks to bring before the Appellate courts which were not raised below must be appropriately noted. The appropriate portion of the applicable section is reproduced below.

> Rev. Rule 1:7-1 (c) ". . . If the questions involved include any not presented to the court below, this fact shall be noted. The foregoing requirements are to be considered in the highest degree mandatory, admitting of no exception; ordinarily no point will be considered which is not set forth in or necessarily suggested by the statement of questions involved."

Appellants neither made such a notation nor did they directly attack the validity of the said statute before the Appellate Division of the Superior Court. They first impugned the constitutionality of the statute in their petition for certification before the New Jersey Supreme Court, again without appropriate notation. Accordingly, the New Jersey Supreme Court was not bound to consider that issue. *Lettieri* v. *State Board of Medical Examiners*, 24 N. J. 199 (1957).

Therefore Appellants have not complied with the rules of this court, in that they did not raise the very issue upon which they base the present appeal in proper or timely manner before the State courts, as required by Title 20 United States Code, Section 1257 (2).

Appellants argue that they did in fact make such argument, but an examination of the record indicates that all they did was assert the principle that private property may only be taken for public use; and only before the New Jersey Supreme Court did they attempt to draw from that principle the conclusion of statutory invalidity for which they now contend, and at that point the court was not bound to consider it. Before both the trial court and the Appellate Division Appellants elected to utilize this constitutional doctrine only to attempt to persuade those tribunals of the construction of the statue, not of is invalidity. *Mergenthaler Linotype Co.* v. *Davis*, 251 U. S. 256, 259.

Accordingly, the appeal is defective and should be dismissed.

POINT II

The questions presented by the present appeal are so unsubstantial as not to require further argument.

A.

The questions presented by the present appeal are totally without merit and unsubstantial. The State of New Jersy did not contend at trial, or before the Appellate Division of the Superior Court of New Jersey or before the New Jersey Supreme Court that private property may be acquired for other than public use, nor does the State so contend here.

Appellants argue that the proposed roadway to be constructed on the disputed property is for "the admitted exclusive use of another." This is simply not true. The roadway will be in public ownership and open to use by the public at large, including but not limited to the landlocked neighbor, Sheldrick. It is a matter of well-settled law that a use is not denominated public or private by mere reliance upon the number of persons it serves. See *Scudder* v. *Trenton Delaware Falls Co.*, 1 N. J. Eq. 694, 726-728 (Ch. 1832), cited with approval in *Texas Pipe Line Co.* v. *Snelbaker*, 30 N. J. Super. 171, 176-178 (Law Div.), affirmed 33 N. J. Super. 11 (App. Div. 1954); *Essex County* v. *Hindenlang*, 35 N. J. Super. 479, 488-491 (App. Div. 1955), appeal dismissed 24 N. J. 517 (1957); *Rindge Co.* v. *Los Angeles County*, 262 U. S. 700, 706-707, 43 S. Ct. 689, 67 L. Ed. 1186, 1192 (1923); *In re Legislative Route 62214, Section 1-A*, 299 A. 2d 1 (1967); 2 *Nichols, Eminent Domain* (revised 3d ed. 1963), §7.512 (1), pp. 705-706, 5A Thompson, Real Property (1957 replacement), §2577, pp. 658-660. It has been stated that a use does not "fail to be public upon the ground that the immediate enjoyment of it

is limited to a small group or even to a single person." *United States* v. *Boyle,* 52 F. Supp. 906, 908 (N. D. Ohio 1943), affirmed sub nom.; *Cleveland* v. *United States,* 323 U. S. 329, 65 S. Ct. 280, 89 L. Ed. 274 (1945). Accord, *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112, 161-162, 17 S. Ct. 56, 41 L. Ed. 369, 389-390 (1896). Numerous cases from several jurisdictions support the view that where the condemnor creates a landlocked remainder ancillary to road construction, it is a public use for the condemnor to cure that condition by providing access through the lands of another, even absent specific statutory authority. *State* v. *Davis,* 87 N. J. Super. 377 (App. Div. 1965), certif. denied, 46 N. J. 135 (1965); *May* v. *Ohio Turnpike Commission,* 178 N. E. 2d 920, 921 (O. Sup. Ct. 1962); *Tracey* v. *Preston,* 178 N. E. 2d 923, 924 (O. Sup. Ct. 1962); *Luke* v. *Massachusetts Turnpike Authority,* 337 Mass. 304, 149 N. E. 2d 225, 228 (1958); *Pitznogle* v. *Western Maryland R. Co.,* 87 Atl. 917, (Md. Ct. of App., 1913); *People ex rel. Dept. of Public Works* v. *Chevalier,* 340 P. 2d 598, 52 Cal. 2d 299 (1959).

Appellants are compelled to ignore this long line of judicial and academic authority in order to assert without demonstration that there is a substantial question presented by this appeal. They have also had to ignore the plain sense of the situation. They profess a fear that the present case stands as precedent for the acquisition of private property "for any use whatsoever." This is patently an unfounded apprehension. The New Jersey Courts clearly confined their opinion to those cases falling within the ambit of N.J.S.A. 27:7A-4.1 and the rigorous criteria imposed of that statute. There can be no serious argument otherwise.

The New Jersey legislature was careful in drafting the statute now under attack to impose two sets of conditions

precedent to the exercise of the administrative discretion delegated therein. The remainder parcel must be either rendered landlocked, or so situated as to render the cost of acquisition of the whole practically equivalent to the cost of acquisition of the portion needed for the right of way proper. Only after one or the other of these criteria has been met may the Commissioner acquire the remainder, and then only if the interest of the public will be best served thereby. Every judicial echelon in New Jersey has agreed that both sets of criteria have been satisfied in the present matter.

It is significant to note that the statute under attack is not part of the general condemnation act of New Jersey, as Appellants erroneously claim. The general condemnation act is to be found in Title 20 of the Revised Statutes of New Jersey; the present statute on the other hand is specifically directed to freeways or parkways, and its intent is to ease some classes of public burden created by the advent of such limited access highways, and at the same time to enable the integrated development of the general plan for their construction.

Appellants now ask this Court to declare that the legislature of New Jersey is powerless to direct that course of action which is at once most economical of public funds; which avoids the creation of unusable and virtually worthless remnant parcels; and which is most conducive to maximum utilization of land resources for the community at large.

In order to prevail in this request they have relied heavily on certain dicta in *Cincinnati* v. *Vester,* 281 U. S. 439, 74 L. Ed. 950 (1930). In so doing they have ignored the main thrust of that decision. The factual findings there before the court were that the "excess takings" in that case could not be justified on the theory of avoidance of

remnant lots or on the preservation of the improvement, the very grounds on which the present statute proceeds. Even so, however, this court expressly declined to pass upon the constitutionality of the very broad municipal ordinance there challenged, and rested its opinion entirely on the finding that the proceedings were not taken in conformity with applicable State law. Appellants in the present matter make no such claim.

Even in that portion of the opinion upon which Appellants rely, however, the court recognizes the great weight which will be accorded to State legislative declarations and "in particular the judgments of State courts as to the uses to be considered public in the light of local exigencies." 281 U. S. *Id.* at p. 446.

In the present matter, unlike *Vester,* we have a clear statement of legislative intent as well as a series of decisions on the very case *sub judice* at every level of the New Jersey courts. See also *State* v. *Davis, supra.* It is appropriate that the legislature of New Jersey, perhaps the most densly populated State in the Union, should be concerned with preventing readily avoidable waste of its precious land resources in unusable remnants and landlocked acreage. Local law, both legislative and judicial, as well as the force of local needs and conditions uniformly supports the validity of the statute under attack, even under the very broad interpretation of the *Vester* case for which the appellants contend.

That interpretation however, if it was ever appropriate, has been devastated by much more recent decisions of this Court. For example, in *Berman* v. *Parker, supra,* Mr. Justice Douglas, speaking for a unanimous court stated:

> "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size

> of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch."

The *Parker* case dealt with slum clearance and this court determined that it would not inquire into the redevelopment agency's propriety in acquiring admittedly non-slum real estate (a department store) in order to achieve a balanced community. In the present case, the State of New Jersey is attempting to further its massive road building program in accordance with its general plan of following that course of action which is most economical of public monies; most conducive to achievement of maximum efficiency in land use; and which avoids creation of unusable, and unsightly remnants bordering our highways, and burdening our public. Just as this Court recognized the inherent connection between eradication of slums and the overall community development, there is a similar vital link between the construction of a limited access highway and the avoidance of land remnants or landlocked parcels created by that very construction.

The present case presents no occasion for departure from the holding of *Parker* that the question of what constitutes a public use is a legislative rather than judicial one.

The other cases cited by Appellants re-affirm rather than contradict the State's contentions herein. New Jersey earnestly submits that where its legislature has spoken with such specificity and restraint that the Court should continue to follow its honored practice of deeming the legislative declaration conclusive. As Mr. Justice Black said in delivering the majority opinion in *U. S. ex rel. T.V.A.* v. *Welch, supra* at p. 551, *et seq.*

"We think that it is the function of Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority. *United States* v. *Gettysburg Electric R. Co.*, 160 U. S. 668, 679. It is true that this Court did say in *Cincinnati* v. *Vester*, 281 U. S. 439, 446, that "It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one." But the Court's judgment in that case denied the power to condemn "excess" property on the ground that the state law had not authorized it. And in *Hairston* v. *Danville & Western R. Co.*, 208 U. S. 598, 607, this Court, referring to the "rule" later stated in the *Vester* case, said that "No case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses in conformity with its laws." And see *Madisonville Traction Co.* v. *Mining Co.*, 196 U. S. 239, 257, 260-261. But whatever may be the scope of the judicial power to determine what is a "public use" in Fourteenth Amendment controversies, this Court has said that when Congress has spoken on this subject "Its decision is entitled to deference until it is shown to involve an impossibility." *Old Dominion Co.* v. *United States*, 269 U. S. 55, 66. Any departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields. See *Case* v. *Bowles*, 327 U. S. 92, 101; *United States* v. *New York*, 326 U. S. 572."

B.

The second point raised by Appellants to the effect that the statute imposes on the trial court the duty to usurp the function of commissioners in determining value is totally devoid of any merit or substance whatsoever. A reading of the statute and of the trial judge's opinion makes it perfectly clear that the statute did not require nor did the trial court find absolute value. The only issue was the relative value of the whole parcel as compared to the value of the portion within the normal right of way. The trial judge was careful to state that he in no way was deciding the ultimate issue of compensation (App. c. p. 9A) but was merely determining the issue of practical equivalence raised by the statute.

Appellants create the patently false impression that somehow they are to be denied a commissioners' award and the right of appeal therefrom to a jury. It is the Order Appointing Commissioners from which these Appellants appeal. As soon as the present appeal is determined commissioners will be appointed and the matter will be processed in precisely the same manner as any other condemnation case. *State* v. *N. J. Zinc Co.*, 40 N. J. 560, 572 *et seq.* (1963).

By having taken the matter to appeal the appellant's rendered it impossible to proceed; they now claim for the first time that failure to proceed is a denial of due process. It is difficult to imagine an argument which is less just, less reasonable, or less substantial.

CONCLUSION

The law is well settled that the determination of what constitutes a public use is a legislative one. Appellants have failed to point to even one case where this Court has held that such a legislative determination has exceeded constitutional boundaries. Appellants have further failed to make out any case for their allegations of substance in the present matter. The decisions of the New Jersey Courts being clearly correct it is respectfully urged that the present appeal be dismissed.

Respectfully submitted,

ARTHUR J. SILLS,
Attorney General of New Jersey,
Attorney for Appellee, Commissioner of Transportation (formerly State Highway Commissioner).

ELIAS ABELSON,
Deputy Attorney General,
Of Counsel.

EDWARD D. MCKIRDY,
Deputy Attorney General,
Of Counsel and on the Brief.

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 817

THOMAS F. BUCK and MARY P. BUCK,
Appellants,

vs.

STATE OF NEW JERSEY,
by the State Highway Commissioner,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF IN OPPOSITION TO MOTION TO DISMISS

JAMES T. DOWD,
Counsel for Appellants,
[illegible]

THOMAS RAEBURN YOUNG,
Of Counsel and
on the Brief.

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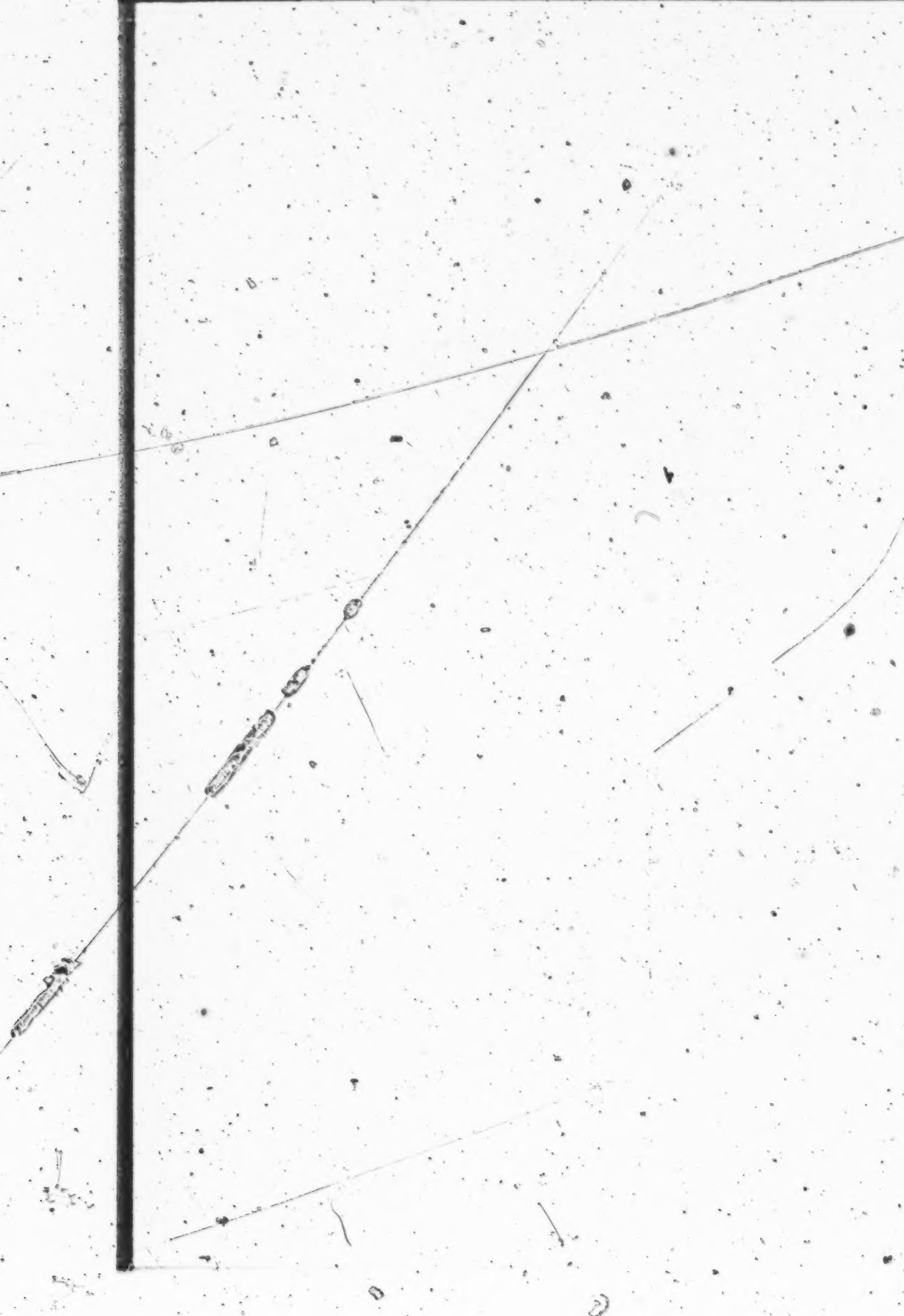

Before proceeding to their brief in opposition to the Appellee's Motion, Appellants rsepectfully wish to correct the record and take issue with several factual representations made in the Motion to Dismiss:

In its "Statement of the Case:, the Appellee, at page 3, makes the factual statement "defendant also contests the state's rights to take another portion of the property, bu has since waived as to that portion." This statement is not factual. Appellants did originally waive (D45a-3 to 9) with respect to other disputed portions of the property but, following introduction of new maps by the Appellee, the waived portions came back into controversy (D117a-12 to 19).

Further, by its "Statement of the Case:, Appellee states "the Sheldrick acreage will thereby be available for development. . . . ." This statement is not factual and creates an erroneous impression. The fact is that the Sheldrick acreage is only 5.308 acres and the local zoning ordinance (as stated in Appellee's "statement of the case: at page 4) requires a minimum lot size of 3 acres—though effectively identifying this property as a single lot.

Further development is possible according to the existing zoning laws.

It is difficult for Appellants to understand or appreciate Appellee's statement in "II" (page 9) in its Motion to Dismiss that the "roadway will be . . . upon to use by the public at large . . . ." It is so clear from both the testimony and the exhibits that the proposed driveway is only a 590 foot long six inch gravel, 10 foot wide, driveway, from a "dead-end" roadway to a neighbor's private single family residence property, that Appellants are simply unable to conclude how the Appellee's submits as a fact that such driveway is open to public use.

ARGUMENT

POINT I

The lack of validity of the statute under attack was previously in the courts below.

Appellants questioned the validity of N.J.S.A. 27:7A-4.1 in the following instances:

A. Law Division of the New Jersey Superior Court

The validity of the statute was questioned in this trial court by the memorandum of law submitted by defendants and by oral argument of counsel for defendants (D125a-22 to D126a-1, 2) and (B129a-10 to 16).

B. Appellate Division of New Jersey Superior Court

The validity of the statute was again attacked by Appellants in Part IV of the Brief in this court as well as in all argument when the matter was heard.

C. Supreme Court of New Jersey

Appellants, again, attacked the validity of the statute in question in Points III, IV and V of the Petition for Certification.

POINT II

The questions are substantial.

It is ludicrous to state that the question before this court is not substantial. Fundamental to the concept of freedom is the right to own land and fundamental to the Constitution is the inhabitation of any state agency to take private land for private use. Appellants do not wish to burden this

court with an exhaustive review of the massive weight of cases which have been heard before this court earlier on this issue of jurisdiction.

Mr. Justice Grey, speaking for this unanimous court, in *Missouri Pacific Railway Co.* v. *State of Nebraska, etc.* (1896) 164 U. S. 403, 41 L. Ed. 489, stated:

> "The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is violation of the 14th Amendment of the Constitution of the United States."

See also *Cole* v. *LaGrange,* 113 U. S. 1, 28 L. Ed. 896; *Wilkinson* v. *Leeland,* 27 U. S. 2, 7 L. Ed. 542; *Davidson* v. *New Orleans,* 96 U. S. 97, 24 L. Ed. 616 and *Madisonville Traction Co.* v. *St. Bernard Mining Co.,* 196 U. S. 239, 49 L. Ed. 462.

In the *Madisonville Traction Co.* case, *supra,* Mr. Justice Harlan, speaking for the majority, said, in part:

> "It is fundamental in American jurisprudence that private property cannot be taken by the government, national or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That principle, this court has said, grows out of the essential nature of all free governments."

and Mr. Justice Grey, again, in the *Cole* v. *LaGrange* case, cited hereinabove, stated:

> "The general grant of the legislative power in the constitution of a state does not enable the legislature in their exercise either of the right of eminent domain

or of the right of taxation, to take private property, without the owner's consent, for any but a public object."

See also *Citizen's Sav. & L. Assoc.* v. *Topeka,* 20 Wall 655, 22 L. Ed. 455 and *Chicago B.Q.R. Co.* v. *Chicago,* 166 U. S. 226, 41 L. Ed. 979.

In addition to being of substantial constitutional interest the present accelerated rate of social progress in America dramatizes the urgency of the issue before the court. In 1962, as reported by the Committee on Public Works to the 88th Congress, Second Session, from Federal sources alone (excluding state, county, municipal and other condemning agencies) 1,480,000 acres were required per year. This requested an annual expenditure of $1,291,200,000 and represented 154,790 separate and individual "takings" each year. The rate of increase of these "takings" is approximately 25 per cent.

CONCLUSION

The law is well settled that the determination of what constitutes a public use is a judicial one. The matters set forth in the jurisdictional statement and in this brief make a clear case of substance in the matter before the court and the Motion to Dismiss should, therefore, be denied and jurisdiction noted herein.

Respectfully submitted,

JAMES T. DOWD,
Counsel for Appellants.

RICHARD BRIAN YOUNG,
Of Counsel and on the Brief.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

BUCK ET UX. v. NEW JERSEY.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 817. Decided January 15, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.